Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

GEORGE TRAHAN

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a case of breach of contract under 29 USC 185, where the excuse to the rule of exhaustion/finality of grievance procedure is based on the employer's repudiation of grievance procedures, a *"hybrid"* action under *DelCostello v. International Brotherhood of Teamsters*, 462 US 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) involving both breach of contract and breach of the union's duty of fair representation.

2. Should the court extend *DelCostello* rejecting the most analogous state law limitation period in favor of a six (6) month limitation period adopted from the National Labor Relations Act, to a case under 29 USC 185 for breach of contract by the employee where the employer has repudiated the union's efforts to trigger mandatory grievance procedures of a collective bargaining agreement.

PARTIES TO THE PROCEEDING

1. Petitioner: George Trahan an individual citizen of the United States of America.

2. Respondent: BellSouth Telecommunications, Inc. potentially with parent companies and/or subsidiaries whose identities are unknown to petitioner.

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CITATION OF OPINION

"George Trahan v. BellSouth Telecommunications, Inc." No. 97-30517 an unpublished opinion of the United States Court of Appeals for the Fifth Circuit, issued October 8, 1997, See Appendix p. 1.

BASIS FOR JURISDICTION

Judgment was entered in the United States Court of Appeal for the Fifth Circuit on October 8, 1997. Jurisdiction of this court to review the judgment of the United States Court of Appeals for the Fifth Circuit is conferred by 28 USC 1254(1).

PROVISIONS OF LAW

1. 29 USC 185

   (a) *Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.*

2. Rules of Decision Act Rev. Stat. § 721, 1 Stat. 92.

   "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide shall be regarded as rules of decision in trials of common law in the

courts of the United States in case where they apply."

STATEMENT OF THE CASE

Statement of fact.

Appellant, George Trahan was employed by BellSouth Telecommunications, Inc. (hereinafter "BST") for twenty (20) years. Mr. Trahan was discharged from his employment effective December 17, 1992. At the time of his discharge a collective bargaining agreement was in existence between BST and the Telecommunications Workers of America, of which Mr. Trahan was part. The collective bargaining agreement provided that employees such as Mr. Trahan would be reinstated if discharged without good cause and due process. Article 11.01 of the Collective Bargaining Agreement, requires that if an employee with more than six (6) months of net credited service is discharged, a complaint that the discharge was without just cause, *"shall be subject to the full grievance and arbitration procedure set forth in Articles 21 and 23."* Mr. Trahan had more than six (6) months of net credited service. (Trahan affidavit record pg. 113-114)

Articles 21 and 23 of the Collective Bargaining Agreement provide, respectively, for a grievance procedure and for regular arbitration, expedited arbitration and mediation.

Immediately after his discharge Mr. Trahan initiated a grievance with his union. The union found that it did not agree with the company's decision to discharge Mr. Trahan. The union advised BST of its conclusion and

requested that the company participate in mediation pursuant to the collective bargaining agreement. On August 23, 1993 Union representative Booker T. Lester, Jr. made a request to BST for arbitration using the expedited procedure under Article 23.02 of the Collective Bargaining Agreement. Pursuant to Article 23.02 of the Collective Bargaining Agreement, upon the filing of this request for expedited arbitration, the matter should have been submitted to arbitration under the expedited arbitration procedure, within fifteen (15) calendar days thereafter. If the parties agree to expedited arbitration, such a procedure can be utilized. However if no election to use expedited arbitration is made, *"the arbitration procedure in 23.01 shall be followed"*. Pursuant to Article 23.01(D)(3) the arbitration hearing must be started within sixty (60) days of the selection of an impartial arbitrator which must be done within thirty (30) days after the filing of the written request for arbitration.

The company never responded to the demand for mediation though Mr. Trahan was repeatedly told that the matter was being tended to. (Trahan Affidavit Record pg. 113-114) Accordingly on December 7, 1994 the prior attorney for Mr. Trahan asked the union for a progress report. (Record pg. 116) Having not heard anything from the employer the union responded by letter dated January 4, 1995 indicating that the union was being forced to close its file.

Mr. Trahan filed his complaint on July 17, 1996. Jurisdiction in the Federal District court was based on 29 USC 185. By judgment dated April 2, 1997 the United States District Court for the Western District of Louisiana

granted a motion for summary judgment filed by defendant on the issue of the statute of limitation. A motion for new trial was filed on April 10, 1997 and denied on May 8, 1997. An appeal was lodged with the Court of Appeal for the Fifth Circuit on May 15, 1997. Jurisdiction was based on 28 USC 1291. By ruling dated October 8, 1997 the ruling on summary judgment was upheld.

REASON FOR REVIEW

In *Vaca v. Snipes*, 386 US 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) the court identified two instances where exhaustion of mandatory grievance procedures of a collective bargaining agreement and the binding finality of a decision based upon these procedures would be excused. The court found one excuse centered in the situation where the union breaches its obligation of fair representation and another where the employer acts in a fashion which amounts to repudiation of the contractual provisions for arbitration.

DelCostello v. International Brotherhood of Teamsters, 462 US 163, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1993) in dealing with a breach of contract action under 29 USC 185 against the employer and an action for breach by a union of its duty of fair representation found such an action to be a *"hybrid"* action and instead of adopting the analogous state law limitation period or no limitation period at all borrowed a federal six (6) month limitation period from the National Labor Relations Act.

The decision in this case by the United States District Court for the Western District of Louisiana and the

United States Court of Appeals for the Fifth Circuit has now extended the *DelCostello* concept of a *"hybrid"* case and the six (6) month Federal limitation period, to a suit for breach of contract against the employer and an excuse to exhaustion/finality of grievance procedures based upon the second exception to finality established by *Vaca v. Snipes* or employer repudiation of contractual grievance procedures.

Review is necessary to settle the question of the limitation period applicable to a breach of contract action under 29 USC 185 where as an excuse to the exhaustion of grievance procedures or the finality thereof the employee alleges repudiation of the grievances procedures by the employer.

Review is also necessary because in extending *DelCostello* to a breach of contract case which does not involve breach by a union of its duty of fair representation, the United States Court of Appeal has rendered a decision which conflicts with prior decisions of this court including *Autoworkers v. Hossier Cardinal Corp.*, 383 US 696, 87 S.Ct. 1107, 30 L.Ed.2d 296 (1966) and the long standing recognized adherence to the Rules Of Decision Act by this court unless there is clear and expressed congressional intent to adopt a limitation period based upon federal law.

ARGUMENT

The timeliness of a suit brought under 29 USC 185 for breach of a Collective Bargaining Agreement is based on

the state limitation period for contract actions. *Auto-workers v. Hossier Cardinal Corp.*, 383 US 696, 86 S.Ct. 1107, 30 L.Ed.2d 296 (1966).

Respondent admitted in the lower court that a suit for breach of a Collective Bargaining Agreement is subject to the Louisiana rules of prescription for contract actions and acknowledged that a reading of the petitioner's complaint shows that the only claim asserted and which remained pending was a claim for breach of contract. Respondents argued to the District Court however that because of an alleged requirement that the petitioner exhaust any grievance and arbitration procedures, this otherwise breach of contract action, is converted to a *"hybrid action."* A *"hybrid action"* is one which makes a breach of contract claim against the employer and a breach of the duty of fair representation against the union. As a hybrid action a six (6) month period of limitations would apply, not the longer state law period for breach of contract. *DelCostello v. International Brotherhood of Teamsters*, 462 US 163, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

In *DelCostello v. Teamsters* supra the court found that where a Collective Bargaining Agreement adopts mandatory and final grievance procedures, the employee must exhaust these procedures and in order to avoid the binding effect of the grievance decision and proceed with a suit against the employer for breach of contract the employee must show that the union also violated its duty of fair representation. The court therefore considered such a case to be a *"hybrid"* action for which the court adopted the analogous six (6) month statute of limitation of the National Labor Relations Act, rejecting application

of the analogous State Law statute of limitation. This holding was extended by both the District Court and the U.S. Court of Appeals for the Fifth Circuit to the case of bar. This was incorrect for the following reasons.

1. ***DelCostello's* concept of a *"hybrid"* action should not be extended to an action for breach of contract where the excuse to the exhaustion/finality rule is repudiation of the grievance procedures by the employer.**

The reasoning behind the *"hybrid"* characterization is the competing interests in enforcing, *"The private settlement of disputes under [the collective bargaining agreement]"*, *DelCostello* supra 462 US at 166, 103 S.Ct. Act 2291, against recognition of the fact that the exhaustion/finality rule, *"works an unacceptable injustice when the Union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation" DelCostello* supra 462 US at 163, 103 S.Ct. At 2290. To reconcile the conflict, the employee may sue both the union and the employer notwithstanding the finality provision of the collective bargaining agreement. However since the employee must show a breach of the duty of fair representation by the Union and a breach of contract by the employer, it is considered a *"hybrid"* action. This characterization however should be limited to a case where the plaintiff in a breach of contract action against the employer, alleges as the basis to avoid the finality rule for grievance procedures, that the Union violated its duty of fair representation. Only then would the employee have to prove a violation of the union's duty, making the claim against the employer a *"hybrid"* claim.

This court has established another way in which an employee may avoid the finality of a grievance decision and the exhaustion of these procedures. In addition to showing that the union wrongfully refused to process the grievance, the employee may show that there is conduct on the part of the employer which amounts to a repudiation of the grievance procedure.

In *Vaca v. Snipes*, 386 US 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), this Honorable Court identified two (2) *separate* incidents where exhaustion and finality would be excused. The court found one, *"obvious instance where an employee may seek judicial enforcement of his contractual rights arises if the employer acts in a fashion which amounts to a repudiation of the contractual provisions for arbitration."* The court found a separate excuse founded in the *DelCostello* situation where the union breaches its obligation of fair representation. Logic would suggest that only in the latter instance would proof of the unions' violation be an essential element of plaintiff's cause of action for breach of contract, making it a *"hybrid"* claim. However if the employer has repudiated the grievance procedures in the Bargaining Agreement thereby entitling an employee to *"seek judicial enforcement of his contractual rights"*, what point would it serve to require the employee to pursue or prove a claim against the union for breach of its duty of fair representation? If the employee does not have to prove up a claim against the union as part of his claim against the employer it is not a *"hybrid"* action. The contrary ruling by the lower courts in this case impermissibly extends the *"DelCostello"* concept of a *"hybrid"* claim to what in essence is still a breach of contract claim and then by adopting something other than the state law breach of contract limitation period, conflicts with this

court's holding in *Autoworkers v. Hossier Cardinal Corp.*, 383 US 696, 86 S.Ct. 1107, 30 L.Ed.2d 296 (1966).

The only way that the lower court's ruling can be reconciled is if the court intended to establish that in every breach of contract action concerning a collective bargaining agreement with final grievance procedures, the plaintiff must prove a violation of the union's duty of fair representation. Indeed the District court's decision seems centered on such a finding. In its Memorandum Ruling the District Court found, *"when as in this case, the arbitration and grievance procedures in the agreement are the exclusive and final remedy, the plaintiff must prove not only that his discharge was contrary to the contract, but also that the union breached its duty of fair representation"* citing *DelCostello.*

Applying *DelCostello* to the case at bar is a misapplication of *DelCostello* but more importantly would establish a rule that requires every plaintiff to prove a claim against the union even in cases where this court has established that pursuit of grievance procedures or adherence to the finality thereof may not even be required because of employer repudiation. The consequence then is to make every breach of contract action where the agreement contains mandatory grievance procedures subject to a six (6) month statute of limitation effectively limiting the application of the holding in *Hossier* supra, extending the application of the holding in *DelCostello* and encouraging or rewarding employers to repudiate grievance procedures. This alone is a basis for review and reversal.

2. Even if this case presents a *"hybrid"* action, no limitation period applies or the most analogous *state* law statute of limitation should have been adopted and the expansion of *DelCostello v. International Brotherhood of Teamsters* should be reversed or restricted.

Petitioner does not believe that this case is or should be construed as a *"hybrid"* action because of the repudiation of the grievance procedures by the employer and therefore the lack of any strong interest in upholding the finality of enforcing *"the private settlement of disputes under [the Collective Bargaining Agreement]" DelCostello,* supra 462 US at 166, 103 S.Ct. at 2291 citing *United Parcel Service, Inc. v. Mitchell,* 451 US 56, 61, 101 S.Ct. 1559, 1565, 67 L.Ed.2d 732 (1981). However if it is a hybrid action the court should reverse the application of *DelCostello* which *rejected* adoption of the most analogous *state* law limitation period.

Justice Stevens and Justice O'Connor dissented in *DelCostello.* Both were rightfully concerned about the court's departure from the long recognized practice of borrowing state law when federal law is silent on the question of the limitation period. As Justice Stevens stated; *"for the past century federal judges have borrowed state statutes of limitation, not because they thought it was a sensible form of "interstitial law making", but rather because they were directed to do so by the congress of the United States".* Justice Stevens then cited to the Rules Of Decision Act which plainly directs; *"that the laws of several states except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the*

United States in cases where they apply." Justice O'Connor also recognized that, *"resort to state law is the norm for borrowing of limitations periods."* and although disagreeing with Justice O'Connor on the conclusive effect of the Rules Of Decision Act Justice O'Connor nevertheless found that there was no clear federal indication strong enough to outweigh the ordinary presumption that Congress' silence indicates a desire to follow the ordinary rule of borrowing state law.

Admittedly, Justices Steven and O'Connor were part of the majority in *Agency Holding Co. v. Mallery-Duff & Associates*, 483 US 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) where in reliance upon *DelCostello* the court adopted the limitation period of the Clayton Act for purposes of determining the limitation period for a RICO claim. However this does not mean that *DelCostello* was right under its facts, that *Mallery-Duff* was wrong or that the Louisiana contract limitation period is an *"unsatisfactory vehicle(s) for the enforcement of federal law"* in the case at bar where the only claims are breach of contract and repudiation of grievance procedures by an employer. The state breach of contract limitation period is a very satisfactory vehicle to enforce the federal laws which encourage both compliance with a collective bargaining agreement and private dispute settlement procedures. This case does not involve the *"limited circumstances"* where the court must conclude that *"Congress would not choose to adopt state rules at odds with the purpose or operation of federal substantive law." Mallery-Duff* supra 483 US at 147, *DelCostello v. Teamsters* supra 462 US at 161. Applying the state contact limitation period to this case, which is in its very essence a case of two breaches of contract by

the employer, does not frustrate the purpose of 29 USC 185 or the federal interest in private dispute resolution and as such must be adopted under the mandate of the Rules For Decision Act which requires enforcement of state law unless the same is preempted by federal law. There also is no need for predictability or judicial economy to counsel the adoption of the federal limitation period to what is essentially a breach of contract case with a breach of contract excuse to the rule of finality of grievance procedures. Indeed adopting the state limitations rule makes both aspects of the case uniform in the limitation period that applies.

To apply *DelCostello* to convert this case to a *"hybrid"* case involving breach of the duty of fair representation only adds uncertainty to the question of what a breach of contract case really is when the case involves a bargaining agreement with grievance procedures that are repudiated by the employer/defendant. By causing the adoption of the shorter six (6) month limitation period, the application of *DelCostello* in fact frustrates the policy of providing a Federal remedy for an employee/beneficiary of a collective bargaining agreement and shortening the period during which the employer is exposed to a potential suit, actually encourages an employer to repudiate or at least rewards the employer for having repudiated what the court has sought to promote as the private dispute settlement mechanism of collective bargaining agreements.

An opportunity is here presented to continue to formulate the methodology by which the Federal Courts will be guided in deciding what limitation period applies to

Federal causes of action for which Congress has not legislatively created a limitation period. At the same time the court can settle the question of what limitation period applies when an employee brings an action under 29 USC 185 and alleges as an excuse for avoiding the rule of exhaustion/finality for mandatory grievance procedures, that the employer repudiated same.

Lastly, rejecting extension of *DelCostello* to the case at bar and applying the Louisiana contract limitation period will reaffirm adherence to the Rules of Decision Act, emphasize the federal interest in compliance with private grievance procedures and give George Trahan an opportunity to air his grievance to at least one forum.

Respectfully submitted,

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IN THE UNITED SATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30517
Summary Calendar

GEORGE TRAHAN,

Plaintiff-Appellant,

versus

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant-Appellee.

Appeal for the United States District Court for
the Western District of Louisiana
(96-CV-1690)

Before REAVLEY, KING AND DAVIS, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed for the reasons given by that court in its Memorandum Ruling and Judgment dated March 31, 1997.

AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

George Trahan	Civil Action No. 6:96-1690
versus	Judge Tucker L. Melancon
BellSouth Telecommunications, Inc.	Magistrate Judge Mildred E. Methvin

MEMORANDUM RULING AND JUDGMENT

Before the Court is a motion for summary judgment filed by the defendant. For the reasons that follow, the motion is granted.

Background

This is an action under section 301 of the Labor Management Relations Act (LMRA). The plaintiff was terminated from his employment with the defendant, BellSouth Telecommunications, Inc., on December 17, 1992. The plaintiff was a member of the Communication Workers of America union while be was employed making the conditions of his employment, including his termination, subject to the provisions of a collective bargaining agreement between BellSouth and the union. After his termination, the plaintiff requested the union to initiated a grievance procedure, as required by the bargaining agreement, challenging his termination. The union filed a grievance on the plaintiff's behalf. On August 23, 1993, the union requested expedited arbitration of the grievance under the provisions of the bargaining agreement, but BellSouth never responded. The union continued to pursue the grievance until January 4, 1995, at which time the union notified the plaintiff that it was

no longer pursuing his grievance and his case had been closed. The plaintiff received this notification by a letter delivered via certified mail on January 7, 1995. The plaintiff filed this action on July 17, 1996, against the employer alleging a breach of the collective bargaining agreement.

Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings, depositions, and affidavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56.* Once the movant produces such evidence, the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986). If no issue of fact is presented and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. *Id.* Before it can find that there are no genuine issues of material fact, however, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Id.*

Analysis

The defendant has filed a motion for summary judgment asserting that the plaintiff's claim is barred because the statute of limitations has expired. The defendant

asserts that the plaintiff's claim is a "hybrid" action under the LMRA which is governed by a six month statute of limitations period. The plaintiff asserts that he has filed a pure breach of contract claim that is subject to the state law statute of limitations governing contract claims and that this limitations period has not expired. In support of this assertion, the plaintiff alleges that he should not be limited by the impact of the grievance procedures because he has filed suit only against the employer and both the employer and the union failed to follow the grievance procedures making the issue of exhaustion and the grievance procedures themselves irrelevant. The plaintiff's argument has been rejected by both the United States Supreme Court and the Fifth Circuit.

Section 301 of the LMRA, 29 U.S.C. § 185, provides an employee with a federal cause of action against his employer for breach of the collective bargaining agreement. However, when as in this case, the arbitration and grievance procedures in the agreement are the exclusive and final remedy, the plaintiff must prove not only that his discharge was contrary to the contract, but also that the union breached its duty of fair representation (R. *20, Exhibit A, Articles 21 & 23); DelCostello v. Int'l Brotherhood of Teamsters,* 462 U.S. 151, 165 (1983); *Daigle v. Gulf State Utilities Co.,* 794 F.2d 974, 977 (5th Cir. 1986). Both aspects must be proven regardless of whether the plaintiff exhausted the grievance procedures, and regardless of whether the employee is suing the employer, the union, or both. *DelCostello,* 46 U.S. at 165; *Daigle,* 794 F.2d at 977. The reason for this burden is that the two causes of action

are "inextricably interdependent." *Id.* The interdependency arises from the nature of the collective bargaining agreement which mandates that the grievance procedure is the exclusive and final remedy. *Id.* The employee is bound by this finality unless he can demonstrate that the union breached it duty of fair representation. *Id.* Thus, in order to surpass the finality requirements contained within the agreement and proceed on a "pure" breach of contract claim, the plaintiff must demonstrate that the union breached its duty of fair representation. *Id.* This type of action is characterized as a "hybrid" action. *Id.*

The applicable statute of limitations for these "hybrid" section 301 claims is six months, as may be found in section 10(b) of the National Labor Relations Act. *Thomas v. LTV Corp.*, 39 F.3d 611, 621-22 (5th Cir. 1994). The statute of limitations begins to run from the termination of the grievance procedure. *Id.* Here, it is undisputed that the plaintiff was notified by the union that his grievance would no longer be pursued on January 7, 1995.(*R. 20, Exhibit B, pgs. 41-43*). This action was not filed until July 17, 1996, which is well beyond the six month limitations period. Accordingly, the plaintiff's claim is barred by the six month statute of limitations, and will be dismissed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

George Trahan	Civil Action No. 6:96-1690
versus	Judge Tucker L. Melancon
BellSouth Telecommunications, Inc.	Magistrate Judge Mildred E. Methvin

JUDGMENT

In accordance with the Memorandum Ruling issued on this date,

IT IS ORDERED that the Motion for Summary Judgment, filed by the defendant, is granted, and that the plaintiff's claim is dismissed with prejudice.

Thus done and signed this 31st day of March, 1997 at Lafayette, Louisiana.

Tucker L. Melancon
United States District Judge

Supreme Court, U.S.
FILED
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NO. 97-1150

In the Supreme Court of the United States

OCTOBER TERM, 1997

GEORGE TRAHAN
Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.
Defendant.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the appellate court correctly affirmed the grant of summary judgment to BellSouth Telecommunications, Inc. on the basis that petitioner's breach of the Collective Bargaining Agreement suit under 29 U.S.C. § 185 was time-barred as filed more than six months after the petitioner received notice that his Union chose not to pursue arbitration because it had determined that an arbitrator would probably uphold the company's decision to terminate.

PARTIES TO THE PROCEEDING

1. Petitioner: George Trahan an individual citizen of the United States of America.

2. Respondent: BellSouth Telecommunications, Inc.

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CITATION OF OPINION

"George Trahan v. BellSouth Telecommunications, Inc." No. 97-30517 an unpublished opinion of the United States Court of Appeals for the Fifth Circuit, issued October 8, 1997, See Appendix p. 1.

BASIS OF JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

STATEMENT OF THE CASE

Statement of the fact.

George Trahan was terminated from his employment as a Service Technician with BellSouth Telecommunications, Inc. ("BST") December 17, 1992. At the time of his termination he was a member of the Communication Workers of American ("CWA"). As such, the terms and conditions of his employment were subject to the provisions of a Collective Bargaining Agreement ("CBA") by and between BST and the CWA, effective August 9, 1992 and in full force from August 9, 1992 through August 5, 1995. After his termination, the CWA, pursuant to the Collective Bargaining Agreement, filed a grievance on behalf of Mr. Trahan. The CWA pursued the grievance through the multi-tiered procedure provided in the Collective Bargaining Agreement until it reached the arbitration stage. The CWA decided not to pursue arbitration, and notified Mr. Trahan by certified mail on January 7, 1995 of its decision. Eighteen months later, on July 17, 1996, petitioner filed the instant lawsuit.

Jurisdiction in the Federal District court was based on 29 U.S.C. § 185. On April 2, 1997 the United States District Court for the Western District of Louisiana granted a motion for summary judgment filed by defendant on the issue of the statute of limitation. A motion for new trial was filed on April 10, 1997 and denied on May 8, 1997. An appeal was lodged with the Court of Appeal for the Fifth Circuit on May 15, 1997. Jurisdiction was based on 28 U.S.C. § 1291. On October 8, 1997 the Fifth Circuit affirmed the grant of summary judgment.

REASONS FOR DENYING THE WRIT

Petitioner's arguments are unavailing because *DelCostello v. Teamsters,* 462 U.S. 151, 170-171 (1983), was correctly decided; the hybrid § 301 claim was untimely pursued; and there was no repudiation of the Collective Bargaining Agreement by BST. Thus, there is no reason for further review.

I. No Basis to Reverse *DelCostello*

Petitioner argues that the 6 months statute of limitations established in *DelCostelio* for a hybrid § 301 suit should be overturned. The court's reasoning is as sound today as it was in 1983. A hybrid § 301 suit has no close analogy in state law; rather it logically falls within the framework of 29 U.S.C. § 160(b) of the National Labor Relations Act. The National Labor Relations Act is "actually designed to accommodate a balance of interests very similar to those at stake here [a § 301 suit]." *DelCostello,* 462 U.S. at 169. As the court noted, "it is more apt than any ... state-law parallel." *Id.* On that

basis the Court applied the National Labor Relations Act six-month limitation period for making charges of unfair labor practices to the National Labor Relations Board. Thus, Mr. Trahan's suit is untimely as filed more than 6 months after receiving notice from his Union that it would not pursue arbitration.

Moreover, even if the Court were to follow the dissenting opinions in *DelCostello,* Mr. Trahan's suit would still be untimely. Justices Stevens and O'Connor opined that relevant state law statutes of limitation for legal malpractice actions should apply to hybrid § 301 claims. Under La. R.S. 9:5605 a legal malpractice claim must be filed within one year of the alleged act, and of course Mr. Trahan filed suit eighteen months after the Union advised him that it would not pursue arbitration. Thus, Mr. Trahan's suit is untimely under both views espoused in *DelCostello.*[1]

II. No Timely Suit Filed.

Petitioner's Union determined that an arbitrator would likely uphold BST's decision to terminate, and the Union therefore decided not to pursue arbitration. By his own admission Mr. Trahan received notice of the Union's decision on January 7, 1995. Under *DelCostello* Mr. Trahan had to bring suit for breach of the Collective Bargaining Agreement within six months of January 7, 1995. He did not.

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[1] Regardless of timeliness, Mr. Trahan's testimony precluded any legally sufficient allegation of unfair representation against his Union because he merely complained that the Union failed to arbitrate. *Vaca v. Sipes,* 386 U.S. 171 (1967); *Chernak v. Southwest Airlines Co.,* 778 F.2d 578 (10th Cir. 1985).

III. No Repudiation.

Petitioner contends that his case differs from *DelCostello* because BST repudiated the Collective Bargaining Agreement by failing to arbitrate his termination grievance. However, it is undisputed that the Union pursued Trahan's grievance until January 4, 1995; whereupon, it determined not to pursue arbitration.

In argument, petitioner mischaracterizes the Union's notice of its decision to not arbitrate as indicating it was "forced" by BST to do so. Then he equates "forced" with "repudiation." In fact, there is neither evidence of "force" nor of repudiation. Indeed, the Union unilaterally decided that it could not prevail on the merits, and it elected not to pursue arbitration. As a matter of law, there has been no repudiation. The Union's unilateral decision to not request arbitration does not constitute repudiation by BST of the Collective Bargaining Agreement.

If Trahan believed the Union mishandled his grievance by failing to arbitrate he had the right, within six months of notice of its decision not to arbitrate, to file suit against the Union for breach of its duty of fair representation and against the company for breach of the Collective Bargaining Agreement. The Fifth Circuit's affirmation of the district court's grant of summary judgment on the basis of untimeliness is merely an application of well established law. It is not an expansion or an extension of the clear rule of *DelCostello.*

CONCLUSION

For the foregoing reason, the Petition for Writ of Certiorari filed by the Petitoner should be denied.